Shopmen's Local Union No. 468 of the International Association of Bridge, Structural and Ornamental Ironworkers, AFL-CIO *and* AMPAT/-Midwest Corporation and Glaziers Local No. 181 of the International Brotherhood of Painters and Allied Trades, AFL-CIO. Case 8-CD-371

9 June 1983

DECISION AND DETERMINATION OF DISPUTE

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

This is a proceeding pursuant to Section 10(k) of the National Labor Relations Act, as amended, following a charge filed by AMPAT/Midwest Corporation, herein called AMPAT or the Employer, alleging that Shopmen's Local Union No. 468 of the International Association of Bridge, Structural and Ornamental Ironworkers, AFL-CIO, herein called Shopmen, has violated Section 8(b)(4)(D) of the Act by engaging in conduct with an object of forcing or requiring the Employer to assign certain work to employees represented by it, rather than to employees represented by Glaziers Local No. 181 of the International Brotherhood of Painters and Allied Trades, AFL-CIO, herein called Glaziers.

A hearing was held on 13, 22, 24, and 27 September 1982, before Hearing Officer Thomas J. Blabey. All parties appeared at the hearing and all were afforded full opportunity to be heard, to examine witnesses, and to adduce evidence bearing on the issues. Thereafter, AMPAT, Shopmen, and Glaziers each filed a brief in support of its position.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The rulings of the Hearing Officer made at the hearing are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this proceeding, the Board makes the following findings:

I. THE BUSINESS OF THE EMPLOYER

The Employer, an Ohio corporation which is a wholly owned subsidiary of AMPAT Grouping, a Delaware corporation, designs, manufactures, and installs custom architectural metals and glass. It annually ships goods valued in excess of $50,000 directly to points outside the State of Ohio. The parties stipulated, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATIONS INVOLVED

The parties stipulated, and we find, that Shopmen and Glaziers are labor organizations within the meaning of Section 2(5) of the Act.

III. THE DISPUTE

A. *The Work in Dispute*

The work in dispute consists of the in-shop structural glazing (siliconing) of window units being fabricated in the Employer's warehouse (Hussey Building), next to its Cuyahoga Heights, Ohio, plant located at 5171 Grant Avenue.

B. *Background and Facts of the Dispute*

During October 1981 the Employer entered into an agreement with Turner Construction Company to provide structurally glazed window walls (curtain walls) for the Ohio Bell Telephone (OBT) Company office complex located in downtown Cleveland, Ohio. Actual production work on the OBT project commenced on or about 1 June 1982[1] and was scheduled for completion on 31 December. On 15 August the Employer completed work on the Washington Design Center project which is located in Washington, D.C. This was the Employer's only other project which entails structural glazing of window units. On both projects the Employer assigned all of the in-shop glazing to employees represented by Shopmen.

Structural glazing or siliconing of window units is, according to Donald F. Kelly, Jr., president of AMPAT, the bonding of glass to a metal frame.[2] The process may be roughly divided into three subparts: cleaning and priming, bonding, and curing. Principally for aesthetic reasons, there is no metal on the outside of the glass; the only thing securing it to the frame is the silicone bond. Because of this, a proper adhesion of glass to metal is crucial. The "key element" in achieving optimum bonding, according to Kelly, is that "the materials be kept as dirt-free as possible." The metal and glass must be carefully cleaned and the materials must be primed with chemicals. If both the cleaning and priming are performed correctly, the silicone cement or seal (bonding) has the best chance of attaining required adhesion. After bonding, the silicone requires a 14-day curing process during which the units are stored, undisturbed, horizontal-

[1] All dates hereinafter refer to 1982, unless otherwise stated.

[2] The frames are typically aluminum, but other metals are used. They are fabricated at the Employer's 5171 Grant Avenue facility by employees represented by Shopmen.

ly. This is to assure that no weight is transferred to the silicone until it is strong enough to resist the weight; i.e., has become a "structural element."

The Employer leased the Hussey Building, adjacent to the Employer's existing facility, to have adequate space to perform the in-shop glazing. Kelly testified that leases for both buildings run for 8 years and are tied together, and that the Employer plans physically to join the two buildings. Table fixtures designed specifically for the OBT project were assembled in the Hussey Building; they are used to check the alignment and tolerances of a unit and to hold the unit in position during siliconing once it reaches the proper configuration. The window units made for the OBT project weigh between 375 and 425 pounds a piece and must be transported within the plant by an overhead crane.

James A. Bailey, business manager of Glaziers, testified that, sometime in April, he became aware that AMPAT had assigned Shopmen-represented employees the structural glazing work in connection with the Washington Design Center project. Sometime after 20 April, Bailey met with Kelly to discuss the Washington Design project. After touring the Hussey Building, Bailey asked if Kelly intended to do the OBT project the same way. When Kelly answered yes, Bailey claimed the glazing work on behalf of employees represented by Glaziers. Kelly refused to assign the work to Glaziers-represented employees and declared his intention to assign it to Shopmen-represented employees. Bailey then threatened to take the dispute to arbitration and, by letter dated 1 June, informed Kelly that Glaziers was indeed proceeding to arbitration. The arbitration was scheduled for 4 October. In a letter dated 1 July, Mark Hebda, chief shop steward of Shopmen, wrote Kelly that he knew Glaziers had filed a grievance and reasserted Shopmen's claim to the work. On 22 July the Employer posted a notice which stated that, if Glaziers won the arbitration:

> [T]he Company may be required to take this work away from members of the Shopmen's Union and reassign it to the Glaziers. If this occurs, 12 to 15 members of Local 468 will be laid off immediately with little chance of recall. Additional layoffs of members of Local 468 may be required later this year if the Company is unable to compete for jobs similar to Ohio Bell or if these jobs have to be fabricated in other AMPAT plants.

On 27 July at 7 a.m., the Employer's production and maintenance employees represented by Shopmen struck and picketed the Employer's facility. Picketers carried signs that read, "AMPAT MIDWEST DON'T TAKE OUR JOBS AWAY HONK FOR US," and "SHOP WORK IS OUR WORK SHOPMEN'S LOCAL 468 *HONK FOR US*!" The Employer and employees represented by Shopmen, settling the strike, entered into an agreement providing, in pertinent part, that the employees would return to work and that the jurisdictional dispute would be resolved by the Board.[3]

In a telegram dated 4 August, the Ironworkers International Association notified AMPAT that it did not recognize the authority of any arbitrator of Glaziers' grievance to make an award of the work, and that the International Association had filed an article XX charge for violation of the AFL-CIO no-raiding procedure against the Brotherhood of Painters and Allied Trades. Glaziers filed countercharges against Shopmen. The hearing on the article XX charges was scheduled for 29 September.

Glaziers, on 5 August, filed an unfair labor practice charge against the Employer, which later was withdrawn. That charge (Case 8-CA-15955) alleged a violation of Section 8(a)(5) and (1) of the Act for refusal to bargain in good faith since on or about 15 April. On 17 September Glaziers filed another charge (Case 8-CA-16087) containing the same allegation, which is currently pending.

C. *Contentions of the Parties*

The Employer and Shopmen contend that there is reasonable cause to believe that Shopmen violated Section 8(b)(4)(D) of the Act and the proceeding is properly before the Board for determination of the dispute. They further argue that, on the basis of Shopmen's collective-bargaining agreement with the Employer, the Employer's assignment and preference, industry practice, relative skills involved, and economy and efficiency of operation the work in dispute should be assigned to employees represented by Shopmen.

Glaziers contends that the evidence does not establish an unlawful work assignment dispute violative of Section 8(b)(4)(D), particularly because the strike was a "sham" cooperated in by the Employer solely to invoke the Board process. Glaziers contends that it was a sham because it was caused by the Employer posting the 22 July notice, which occurred 7 weeks after Glaziers had notified the Employer of the arbitration and after the Employer had participated in the choice of an arbitrator. Further, the Company did not proceed for an injunction against the illegal strike, nor post a notice requiring the employees to return to work as required by its contract, nor file a damage suit for the wages ultimately paid to the strikers. Glaziers

[3] The strike settlement further provided that there would be "no penalty or reprisals against any employee who participated in the strike or who did not cross the picket line." Pursuant to this, the employees were paid for the time they were not working.

asserts that the issue is not properly before the Board, inasmuch as the Employer "created" the dispute by assigning the work to Shopmen-represented employees, relying upon *Truckdrivers Local 107 (Safeway Stores)*, 134 NLRB 1320 (1961), and *Longshoremen Local 8 (Waterway Terminals)*, 185 NLRB 186 (1970), vacated and remanded 467 F.2d 1011 (9th Cir. 1972), on remand 203 NLRB 681 (1973). Should the Board find a jurisdictional dispute exists, Glaziers contends that the work should be awarded to employees represented by it on the basis of its collective-bargaining agreement with the Employer; industry, area, and national practice; the Employer's past practice; relative skills; and economy and efficiency of operation.

D. *Applicability of the Statute; Ruling on the Motion to Quash Notice of Hearing*

Before the Board may proceed with a determination of dispute pursuant to Section 10(k) of the Act, it must be satisfied that (1) there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and (2) the parties have not agreed upon a method for the voluntary adjustment of the dispute.

Here, contrary to Glaziers' assertions in support of its motion to quash, the evidence is sufficient to establish a traditional jurisdictional dispute between two groups of employees. Shopmen, in its 1 July letter to the Employer, indicated it was aware of the grievance filed by Glaziers claiming the disputed work, and then reasserted its claim to the work. In response to Glaziers' claim and initiation of an arbitration of that claim, the Employer informed Shopmen on 22 July that, should Glaziers win, the arbitration would result in a reassignment of the work in dispute from employees represented by Shopmen to those represented by Glaziers with a consequent loss of jobs to the Shopmen-represented employees. The next day, Shopmen struck and picketed the jobsite with an object of forcing AMPAT to assign the work to employees represented by Shopmen rather than reassign the disputed work to employees represented by Glaziers.[4]

Glaziers' reliance on cases such as *Safeway* and *Waterway*, to support its position, is misplaced. Unlike those cases, this is not a situation where the "employer created a dispute with a union by terminating a group of employees, whom the union represented, and assigning their duties to another group of employees."[5] Here, Glaziers claims that, by obtaining new work and leasing the Hussey building to house the work and hiring new employees, "the Company obviously created the dispute" and caused the strike. This logic ignores the evidence of record that the Employer posted the informational notice to employees represented by Shopmen which led to the strike *in response to* pressure and the pending arbitration instigated by Glaziers in its effort to claim the disputed work. With this in mind, it is apparent that the object of Shopmen's protest was Glaziers' effort to take away work which the Employer had assigned to employees represented by Shopmen. Accordingly, we deny Glaziers' motion to quash the notice of hearing.

The record reveals that AMPAT is not bound by the outcome of the article XX proceeding, and Shopmen is not bound by the arbitration initiated by Glaziers with the Employer. Therefore, there exists no agreed-upon method for the voluntary adjustment of the dispute.

On the basis of the entire record, we conclude that there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed-upon method for the voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that this dispute is properly before the Board for determination.

E. *Merits of the Dispute*

Section 10(k) of the Act requires that the Board make an affirmative award of disputed work after giving due consideration to various factors.[6] The Board has held that its determination in a jurisdictional dispute is an act of judgment based on commonsense and experience reached by balancing those factors involved in a particular case.[7]

The following factors are relevant in making the determination of the dispute before us:

1. Board certification and collective-bargaining agreement

There is no evidence that any of the labor organizations involved herein has been certified by the Board as the collective-bargaining representative for a unit of the Employer's employees.

Since 1973 the Employer has been a member of various employer groups which have had collective-bargaining relationships with Glaziers. Since

[4] Contrary to Glaziers' assertion, we cannot agree this was a sham strike. Although the strikers were not disciplined for their participation in the strike, there is no evidence that this was anything other than an attempt amicably to resolve the dispute. An employer is not required to discipline such strikers, nor to initiate a damage suit in connection with a strike.

[5] *Waterway*, 185 NLRB 187.

[6] *NLRB v. Radio & Television Broadcast Engineers Union, Local 1212, IBEW [Columbia Broadcasting System]*, 364 U.S. 573 (1961).

[7] *Machinists, Lodge 1743 (J. A. Jones Construction Co.)*, 135 NLRB 1402 (1962).

on or about 15 July, the Employer has been a member of the Cleveland Area Glazing Contractors Labor Group of Cleveland, Ohio, which was formed by a merger of two employer groups. Article XIII, paragraph 63, of its collective-bargaining agreement gives Glaziers jurisdiction over the "removing, cutting, and setting" of various types of glass "when in the shop or on the jobsite." Shopmen has represented the Employer's in-shop production and maintenance employees since 1962. Section 1(A) of the Employer's contract with Shopmen gives Shopmen jurisdiction over the "fabrication of iron, steel, metal, and other products . . . in or about the Company's plant or plants located at Cuyahoga Heights, Ohio." While the broad language of AMPAT's contract with Glaziers lends support to Glaziers' claim, testimony comparing AMPAT's contract with Shopmen with those of other Cleveland area glass contractors contracts with Shopmen buttresses its claim that the undefined term "other products" includes siliconing. Section 1(A) of Shopmen agreements with other Cleveland area glass contractors specifically excludes "removing, cutting and setting glass contained in fabricated products," while AMPAT's contract contains no such language. This, Shopmen asserts, is because of AMPAT's practice of using Shopmen-represented employees to perform in-shop glazing on preglazed (i.e., assembled in-shop rather than on-site) products. We conclude, therefore, that this factor does not favor an award of the work in dispute to either party.

2. Employer assignment, preference, and past practice

As to the Employer's past practice, there is evidence that Shopmen-represented employees have historically performed the in-shop glazing. For example, Shopmen-represented employees have performed the in-shop glazing of AMPAT's Clear Rail product (glass handrails). There is evidence that during 1981 the Employer had employees represented by Glaziers perform in-shop glazing on the Wayne County, Michigan, jail, the Southerly Sewage, and the Goodyear projects. However, Joe Mason, contract manager for Midwest, testified that certain glaziers the company considered key employees were transferred in-shop to perform glazing when the weather was bad on-site. The Employer considered it important to keep these men steadily employed so they would not go elsewhere for work; AMPAT often relied on them to run out-of-town jobs and act as foremen on other jobs. Evidence shows that the amount of in-shop glazing performed on these projects by Glaziers-represented employees was not substantial alone, or in comparison to that done by Shopmen-represented employees. The Employer has assigned the work and prefers assignment to employees represented by Shopmen. This factor, therefore, favors an assignment of the work to employees represented by Shopmen.

3. Area and industry practice

Kelly testified that no other employer in the area is working on structurally glazed or siliconed window units.

There is evidence in the record of companies located outside the State of Ohio that do this type of work. At the hearing, Kelly named several of AMPAT's national competitors, and testified that while these companies employ glaziers they also have a shop union that performs preglazing in their shops. Bailey, business manager for Glaziers, introduced evidence on the various innovations and improvements realized in the glazing industry in past years. Included in this was siliconing work performed in the Cleveland area, on-site, by Glaziers on the National City Complex and various malls. But on cross-examination, when asked about the National City Complex job, Bailey admitted that the siliconing was of a different nature. While Kelly's testimony was unspecific, in that he did not name particular jobs at which work similar to the instant disputed work as performed in-shop by Shopmen, Bailey's testimony was misdirected, in that its focus is on innovations in the glazing industry rather than on specific instances of similar structural-glazing work being performed on-site by Glaziers. Therefore, we find that this factor of area and industry practice does not favor either party.

4. Relative skill

Kelly testified that employees represented by Shopmen are performing the structural glazing in a satisfactory, timely manner, and that the Employer has noticed no difference in the quality of work performed in the shop by them *vis-a-vis* that performed on-site by employees represented by Glaziers. We conclude, therefore, that either group of employees is capable of satisfactorily performing the work, and, therefore, this factor favors neither party to the dispute.

5. Economy and efficiency of operations

At the hearing, it was explained that, because the silicone seal is all that holds the glass in place, the frame and glass must be kept free from contaminants and the unit must be stored, undisturbed, horizontally, both to facilitate proper bonding. Also, because of the great weight of each window unit it must be transported by overhead crane. Be-

cause it is easier to protect the metal and glass from contamination and transfer the units in the shop, it is more efficient to perform the disputed work there. We conclude, therefore, that this factor favors an award of the work in dispute to employees represented by Shopmen.

Conclusion

Upon the record as a whole, and after full consideration of all relevant factors involved, we conclude that employees who are represented by Shopmen are entitled to perform the work in dispute. We reach this conclusion relying on the Employer's assignment, preference and past practice, and economy and efficiency of operations. In making this determination, we are awarding the work in question to employees who are represented by Shopmen, but not to that Union or its members. The present determination is limited to the particular controversy which gave rise to this proceeding.

DETERMINATION OF DISPUTE

Pursuant to Section 10(k) of the National Labor Relations Act, as amended, and upon the basis of the foregoing findings and the entire record in this proceeding, the National Labor Relations Board hereby makes the following Determination of Dispute:

Employees employed by AMPAT/Midwest Corporation, who are represented by Shopmen's Local Union No. 468 of the International Association of Bridge, Structural and Ornamental Ironworkers, AFL-CIO, are entitled to perform the in-shop structural glazing (siliconing) of window units being fabricated in the Employer's warehouse (Hussey Building), next to its Cuyahoga Heights, Ohio, plant located at 5171 Grant Avenue.